STANDING UP FOR JUSTICE

The chief medical officer is due to finalise his plans for a radical overhaul of the expert medical witness system. The entire exercise, says **Jonathan Gornall**, was based on a false premise and is a flawed and redundant gesture that will only worsen the supply of experts to the family courts

Bearing Good Witness, the chief medical officer's blueprint for radical reform of the medical expert witness system in the family courts, begins with an extraordinary admission. In the preface Liam Donaldson notes that he was asked to produce his report "in response to some very high-profile court cases that called into question the quality of medical expert witnesses."[1] Then he adds: "In developing my proposals, it has become clear to me that the problem is more one of supply than of quality."

It was an acknowledgement that despite the media response to the quashing of Sally Clark's and Angela Cannings' convictions for murdering their children, and what many believe was the government's attendant overreaction, the quality of expert witnesses was not a substantial concern. The real problem, as Professor Donaldson realised, was a shortage of experts. To the dismay of professionals, however, Professor Donaldson offered no solution to the underlying reasons for the shortage—the prospect of vilification by campaigners and the media and the real risk of doctors losing their livelihoods at the hands of a regulator perceived to be overzealous.

Consultation closed in February, and the chief medical officer was expected to publish the responses he received at the end of May, although a Department of Health spokesperson admitted there is "much more of detail to be discussed before a way forward may be determined to preserve the essential integrity of expert witness activity."

One such response, by the British Association for the Study and Prevention of Child Abuse and Neglect, sums up the problems—and the frustration. David Spicer, a barrister and the organisation's vice chair, believes *Bearing Good Witness* "is based on a wrong premise and identifies the wrong problems. The problem for vulnerable children is not primarily the difficulty in securing expert witnesses in proceedings. It is the withdrawal of paediatricians from child protection work and the reluctance of paediatricians to express opinions or judgments in this area."

MARK THOMAS

MAIN PROPOSALS IN *BEARING GOOD WITNESS*[1]

NHS trusts should form specialist or multidisciplinary teams to deliver medical expert evidence as a public service. (The report estimates that in each of the 38 areas in England the NHS would need to provide 100 reports a year, leading to 25 court appearances)

The costs for the NHS in taking on this additional workload and in training and development should be fully met

The views of key stakeholders should be sought on which public sector organisation is best placed to commission the medical expert witness service

The Law Society, the Academy of Medical Royal Colleges, and the GMC should consider how to improve the quality of instructions to medical experts

The knowledge and skills needed in all court settings should be taught as part of basic and continuing medical education, with priority given to work in child protection cases

The Academy of Medical Royal Colleges should collaborate with other relevant professional bodies to develop accreditation for teams of medical expert witnesses

The GMC should review its guidance, *Giving Expert Advice*

A national knowledge service to support the medical expert witness programme should be established

Donaldson lists four factors that, in his opinion, are deterring doctors from bearing witness, good or otherwise: a lack of training programmes, the stress of being a witness, court processes that are too time consuming, and fear of referral to the General Medical Council by "vexatious parties." Of these, says Mr Spicer "only the last is in reality having a significant impact and that problem is understated in the document."

He has no doubt where the blame lies for the crisis. The three cases of Mrs Clark, Mrs Patel, and Mrs Cannings have fostered what Professor Donaldson called "growing public unease about miscarriages of justice arising from the quality and validity of evidence given by medical expert witnesses in the courts." The reality, says Mr Spicer, was that "It was the unjustified and uncorrected reaction to the cases that caused the crisis—not the decisions or judgments in the cases themselves."

Unworkable solution

Worse, say some, is that Professor Donaldson's key proposal, if acted on, will make it even harder to find experts prepared to work in the family court system.

The report's one big idea is that medical evidence in family court cases should be provided not by paid individuals but by teams of experts to be formed within NHS trusts. The Royal College of Paediatrics and Child Health welcomed the proposal,[2] but it was hardly the vote of confidence for which paediatricians and others had been hoping. It remains unclear on what basis Donaldson believes doctors would, on the one hand,

wish to add to their workload while, on the other, being denied the opportunity to supplement their income with work for the family courts. There is also no proposal for retaining the services of those experts who currently serve the courts and who would face a drop in income as members of NHS teams.

Professor Donaldson envisages a system whereby quality is assured by "the expertise and experience of the leader of the team, by the NHS as employer and by the involvement of several people in the work of producing reports for the courts." But it is unclear how this team approach is expected to protect individual clinicians who, sooner or later, will have to write and sign a report and give evidence in court.

Wrong premise

A major fallacy lay behind the instigation of Professor Donaldson's review—the myth that expert witnesses were failing the justice system. Well before Professor Donaldson produced his report, the government had the results of a review of hundreds of criminal and thousands of family court cases, triggered by the Cannings judgment in December 2004. If they proved anything, it was what Professor Donaldson was to spend two and a half years finding out: that there were no generic problems with the quality of expert evidence.

The Cannings judgment contained the sentence that was to trigger a media witch hunt, excite criminal and family court defence lawyers, and provoke a government overreaction: "In cases like the present, if the outcome of the trial depends exclusively or almost exclusively on a serious disagreement between distinguished and reputable experts, it will often be unwise, and therefore unsafe, to proceed."[3]

The Cannings decision had followed the release of Sally Clark early in 2003[4] and the acquittal in June 2003 of Trupti Patel, accused of murdering two of her children.[5] Roy Meadow was a prosecution witness in all three cases, but although Professor Meadow had given flawed statistical evidence during Mrs Clark's trial, this was the limit of his culpability.

In the wake of Mrs Cannings' acquittal, however, the media, egged on by campaigners against the diagnosis of Munchausen syndrome by proxy, propagated the myth that thousands of criminal and family court cases had hinged solely on the "flawed" evidence of the "discredited" Professor Meadow. "Thousands of families were destroyed by Roy Meadow's work," stated the *Sunday Times* on January 25.[6] There wasn't a shred of evidence for the wild claim, but all medical witnesses—those for the prosecution, at any rate—were now in the dock: "The experts," declared the *Telegraph*, "have wrecked justice."[7]

Government's role in misconception

Much of the blame for the frenzy, however, lay with the government and, not without irony, with the children's minister, Margaret Hodge. The day before the Cannings judgment was handed down, the *Sunday Telegraph* had carried an interview with Mrs Hodge in which it was stated that ministers were to review thousands of family court cases "affected over the past 15 years by Prof Meadow's now-discredited theory of Munchausen Syndrome By Proxy."[8] Mrs Hodge urged anyone who felt that "a judgment was made on the back of evidence from Meadow" to seek to have their case reopened.

Having thus encouraged the idea that Professor Meadow may have been responsible for countless miscarriages of justice, Mrs Hodge went on to cast doubt on Munchausen syndrome by proxy. "The whole issue," she said, "is a crucial one of whether this is a proper diagnosis." This was a surprising statement for the children's minister to make as it seemed to contradict the government's stance in *Safeguarding children in whom illness is fabricated or induced*.[9]

Two days later, the solicitor general, Harriet Harman, announced that the attorney general was reviewing all convictions over the past decade "that potentially involved sudden infant death syndrome."[10]

One of the lawyers who moved quickly to link clients' family and criminal court cases to the Cannings judgment was Sarah Harman, Harriet's sister. She was representing "Mrs B," whose child was under a care order. Mrs B sought permission from the courts to identify to the media one of the doctors in her case as part of her campaign to persuade public opinion and, ultimately, the Court of Appeal, that Munchausen's syndrome by proxy had been misdiagnosed.[11]

Mr Justice Munby refused permission to name the doctor, but in his ruling on the application it emerged that Sarah Harman had sent confidential court documents relating to the case to her sister, the solicitor general, asking her to pass them on to the children's minister. On 26 January, Harriet Harman duly did so. When the documents were returned on 10 February, by order of an indignant judge, it was discovered that someone in Mrs Hodge's office had written on Sarah Harman's covering letter: "Expidite [sic] verdict as will give a civil case judgement on which we can base review".[12] A spokesperson for the Department for Education and Skills told the *BMJ*: "As soon as the Department became aware that it had received papers that had not properly been disclosed to us, the papers were returned. Thus, the DfES is not in a position to comment on handwritten remarks that are reported to have been added, in early 2004, to Sarah Harman's letter." The department also said it was unaware of Mrs Hodge having had any contact between June 2003 and May 2005 with Sarah Harman.

Less than a month after receiving the documents, Mrs Hodge announced a review of family court cases.[13] This decision, the DfES insisted, "flowed solely from the judgment in the (criminal) Court of Appeal case R *v* Cannings."

Mrs Hodge reported the initial results to parliament in June 2004. Disputed expert medical evidence had featured in only 47 out of 5175 current care cases, and the review had resulted in a change to the care plan in just one case. Nevertheless, she said, the results "should not give rise to complacency that the interests of children and their families are being optimally served." The next phase of the review would examine some 30 000 care orders already in place. She was also asking the chief medical officer to "determine how best to ensure the availability and quality of medical expert resources to the family courts," an order that led to *Bearing Good Witness*.

Remarkably, Mrs Hodge then referred to the result of the appeal in the case of Mrs B. Although the appeal had been refused, she said: "This important judgment sets out clearly the ways in which the judgment in the case of Angela Cannings impacts on the family jurisdiction."[14]

It certainly did. "There may," it stated, "have been a tendency in some quarters to over-estimate the impact of the judgment in R *v* Cannings in family proceedings." The decision had turned "on the very particular facts of that case," and "practitioners should be slow to assume that past cases which have been carefully tried on a wide range of evidence will be readily reopened."[15]

It wasn't until November 2004 that Mrs Hodge was able to disclose the results of the second phase of her review, which had identified 28 867 children who were the subject of care or freeing orders. Of these, it emerged, just five cases had "involved a serious disagreement between medical expert witnesses." The care plan remained unchanged in three of these five cases. In the fourth, the

plan had been changed already in the light of fresh information received. In the fifth, "further consideration of medical evidence by the court is being awaited."[16]

In other words, Mrs Hodge's reviews of more than 34 000 family court cases had failed to justify the concern that had led to Professor Donaldson's review of the expert witness system.

The attorney general's review of criminal cases had fared little better. By December 2004, it had looked at 297 cases, identifying 28 that "gave sufficient cause for concern in relation to the medical evidence relied upon at trial so as to warrant further consideration." Only six cases resulted in applications to the Criminal Cases Review Commission, which decided a referral to the Court of Appeal was merited in only two—neither of which raised any concerns about the quality of expert evidence.[17]

Legal solutions

The courts, meanwhile, continued to evince faith in Professor Meadow's expertise. In July 2005, the Court of Appeal considered the case of Paul Martin, one of the 28 cases highlighted by the attorney general's review. Mr Martin argued that because Professor Meadow was now "discredited," his conviction was unsafe. The court rejected the appeal, concluding: "That [Meadow] had, and still has, enormous expertise is not in doubt."[18]

On 17 February 2006, High Court judge Mr Justice Collins allowed Professor Meadow's appeal against the General Medical Council's finding of serious professional misconduct and restored him to the medical register. Equally importantly, the judgment also produced a workable solution to the problem of how to protect expert witnesses from vexatious complaints, while at the same time assuring that the public was properly protected.[19]

Expert witnesses, said Mr Justice Collins, "should not be vulnerable to claims from disgruntled clients." The decision to refer an expert to the relevant disciplinary body should be left to the judge in the case, who was best placed to determine whether "his conduct has fallen so far below what is expected of him as to merit some disciplinary action."

Professionals welcomed the conditional immunity bestowed by the judgment, but it didn't last long—just five months. On 17 July, the GMC appealed against the ruling and was joined in the successful action by Lord Goldsmith, the attorney general. He told the court he recognised there was a shortage of experts, but the issue was one of "balancing the risk of important expert evidence not being available with the risk that the public would not have confidence in the justice system."[20]

In the judgment, Lord Justice Thorpe disclosed that as a result of concerns that doctors "were either withdrawing from or declining to enter forensic work, a vital ingredient of overall child protection services," he, as chair of the Family Justice Council's interdisciplinary family law committee, had begun discussions with the GMC as early as May 2004 about how best to deal with vexatious complaints. Plans were laid to pilot a system in the family division that "would ensure that the judge would in all cases consider and appraise the quality of any expert evidence, with that part of his judgment . . . being made available to the GMC in the event of any complaint being received."

By January 2006, this promising solution had foundered on undisclosed "inherent difficulties," but "further pursuit was apparently rendered unnecessary by the judgment of Collins J allowing Professor Meadow's appeal."

With this now overturned, Lord Justice Thorpe was clearly vexed that no alternative solution had been found. "This," he said, "is now urgent business." He noted that the attorney general, having said that Collins' extension of witness immunity was impermissible, had "submitted that the real issue became what should be the control mechanism to protect expert witnesses from unfounded or malicious complaints [but had] no positive suggestions as to what the control mechanism might be."

Lord Justice Thorpe was also critical of the mounting delay in the publication of the chief medical officer's report and clearly doubtful that it would offer any solutions. The attorney general had said that the chief medical officer's report "would propose incentives to encourage specialist registrars to undertake forensic work. What he was not able to say was that the report would propose minimising existing disincentives or deterrents."

CHRIS YOUNG/PA

"Mrs Hodge's reviews of more than 34 000 family court cases had failed to justify the concern that had led to Professor Donaldson's review"

The urgency had been exacerbated by the curious delay before Professor Donaldson's proposals saw the light of day. *Bearing Good Witness* was finally published in October last year—perhaps not coincidentally, within a week of Lord Justice Thorpe's critical judgment—yet Mrs Hodge had announced the review more than two and a half years previously and the recommendations had been expected in early 2005. Perhaps the delay had had something to do with an inability to find a solution to the real problem besetting the supply of expert witnesses.

It was clear from an exchange before the House of Commons Science and Technology Committee in November 2005 that the attorney general, at least, was still hoping that Professor Donaldson would pull something out of the hat. Robert Flello, the member of parliament for Stoke on Trent, asked Lord Goldsmith: "What steps have you taken to restore expert witnesses' confidence in the court system, following the public vilification of Meadow? What are you doing to remedy the shortage of experts willing to give evidence, particularly in paediatric specialities?"

Lord Goldsmith replied: "The Chief Medical Officer has been asked to consider and report on that particular issue and for there to be recommendations. I am told that he will report before the end of this year."[21]

The attorney general, it seems, was thinking wishfully. Lord Justice Thorpe's "urgent business" remains unattended to. Although *Bearing Good Witness* alludes to the discussions held between the Family Justice Council and the GMC, it contains no direct proposal to protect expert witnesses and doctors working in child protection, who remain at the mercy of a regulator apparently unable or unwilling to deal with the problem of vexatious complainants.[22 23]

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See references on bmj.com